(4) (5) (3)

Nos. 04-12, 04-15 & 04-18

Supreme Court, U.S.
FILED
SEP 1 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL.,
Petitioners,

AT&T CORP., ET AL.,
Petitioners,

AND

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Petitioners,

v.

UNITED STATES TELECOM ASSOCIATION, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS BELLSOUTH, QWEST, SBC, USTA, AND VERIZON IN OPPOSITION

JAMES W. OLSON
INDRA SEHDEV CHALK
MICHAEL T. MCMENAMIN
ROBIN E. TUTTLE
UNITED STATES TELECOM ASSOCIATION
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7300
Counsel for United States Telecom Association

MICHAEL K. KELLOGG
Counsel of Record
MARK L. EVANS
SEAN A. LEV
COLIN S. STRETCH
SCOTT H. ANGSTREICH
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., United States Telecom Association, and the Verizon telephone companies

(Additional Counsel Listed On Inside Cover)

September 1, 2004

JAMES D. ELLIS
PAUL K. MANCINI
JOSEPH E. COSGROVE, JR.
SBC COMMUNICATIONS INC.
175 East Houston
San Antonio, Texas 78205
(210) 351-3500

GARY L. PHILLIPS
CHRISTOPHER HEIMANN
JAMES P. LAMOUREUX
SBC COMMUNICATIONS INC.
1401 I Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 326-8910
Counsel for SBC Communications Inc.

JAMES G. HARRALSON
BENNETT L. ROSS
THEODORE R. KINGSLEY
E. EARL EDENFIELD JR.
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, Georgia 30309
(404) 249-2641
Counsel for BellSouth Corporation

ANDREW CRAIN
ROBERT B. MCKENNA
CRAIG BROWN
QWEST COMMUNICATIONS INTERNATIONAL INC.
1801 California Street, 51st Floor
Denver, Colorado 80202
(303) 672-2861
Counsel for Qwest Communications International Inc.

WILLIAM P. BARR
MICHAEL E. GLOVER
JOHN P. FRANTZ
EDWARD SHAKIN
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, Virginia 22201
(703) 351-3099

HENRY WEISSMANN
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, California 90071
(213) 683-9100
Counsel for the Verizon telephone companies

QUESTIONS PRESENTED

1. Whether the D.C. Circuit correctly determined that the FCC may not subdelegate to 51 separate state regulatory commissions the responsibility that Congress expressly assigned to the FCC to determine which "network elements" incumbent local exchange carriers must make available to their competitors on an "unbundled" basis.

2. Whether the D.C. Circuit, in reversing the FCC's decision to require blanket nationwide unbundling of certain facilities, reasonably applied established principles of administrative law when it concluded, for example, that the FCC ignored significant alternatives raised in the record.

3. Whether the FCC acted reasonably in finding that it is consistent with 47 U.S.C. § 251(d)(2)(B) to require only limited unbundling of broadband facilities when, among other things, there is already extensive competition in the market for broadband services and competitors can provide broadband services by relying on other unbundled network elements.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., the United States Telecom Association, and the Verizon telephone companies state the following:

BellSouth Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

Qwest Communications International Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

SBC Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

The United States Telecom Association ("USTA") is the nation's oldest and leading not-for-profit trade association for the local telephone industry. Founded more than a century ago, USTA's carrier members provide a full array of voice, data, and video services over wireline and wireless networks. USTA also has international and associate members that include consultants, communications equipment providers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for which disclosure is required.

The Verizon telephone companies are wholly owned subsidiaries of Verizon Communications Inc., a publicly held company. Those subsidiaries are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.

Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENTS ii

TABLE OF AUTHORITIES v

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITIONS 13

I. THE D.C. CIRCUIT'S INVALIDATION OF THE FCC'S REIMPOSITION OF BLANKET NARROWBAND UNBUNDLING DOES NOT MERIT REVIEW 13

II. THE D.C. CIRCUIT'S AFFIRMANCE OF THE FCC'S DECISION LIMITING UNBUNDLING OF COMPETITIVE BROADBAND FACILITIES DOES NOT MERIT REVIEW 25

III. PETITIONERS' ADDITIONAL ARGUMENTS ARE EQUALLY INSUBSTANTIAL 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

AT&T Corp. v. Iowa Utils. Bd.:

525 U.S. 366 (1999) ..... *passim*

531 U.S. 1124 (2001) 15

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 30

Batterton v. Francis, 432 U.S. 416 (1977) 17, 18, 19

Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837 (1984) 23, 27

Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) 24

Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 24

Printz v. United States, 521 U.S. 898 (1997) 17

Southern Pac. Transp. Co. v. Watt, 700 F.2d 550 (9th Cir. 1983) 20

USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003) 5, 6, 15, 21, 22, 23

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 21, 28

Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002) ..... *passim*

Vierra v. Rubin, 915 F.2d 1372 (9th Cir. 1990) 20

Wisconsin Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002) 17, 19, 20

WorldCom, Inc. v. USTA, 538 U.S. 940 (2003) 6, 15

ADMINISTRATIVE DECISIONS

First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) 4

Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999), *vacated and remanded, USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003) 5, 6

ADMINISTRATIVE MATERIALS

Indus. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003* (June 2004) 29

William E. Kennard, Chairman, FCC, *Moving On*, Remarks Before the NARUC Winter Meeting, Washington, D.C. (Feb. 23, 1999) 5

Press Release, FCC, *FCC Chairman Michael K. Powell Announces Plans for Local Telephone Competition Rules* (June 14, 2004) 13

Press Release, FCC, *Office of Solicitor General Will Not Appeal DC Circuit Decision* (June 9, 2004) 13

STATUTES

Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*:

47 U.S.C. § 157 note 26

47 U.S.C. § 201 30

47 U.S.C. § 251 ..... 29, 30

47 U.S.C. § 251(c)(3) 3, 4, 29

47 U.S.C. § 251(d) 16

47 U.S.C. § 251(d)(1) 4, 16

47 U.S.C. § 251(d)(2) ..... *passim*

47 U.S.C. § 251(d)(2)(B) 2, 4

47 U.S.C. § 252 ..... 27, 29, 30

47 U.S.C. § 252(b)(4)(C) 16

47 U.S.C. § 252(c)(1) 16

47 U.S.C. § 252(d) 17

47 U.S.C. § 252(d)(1) 29

47 U.S.C. § 271 29

47 U.S.C. § 271(d)(3) 29

47 U.S.C. § 271(d)(6)(A) 29

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ..... *passim*

§ 706, 110 Stat. 153 ..... 10, 26, 27

42 U.S.C. § 607(a) 18

LEGISLATIVE MATERIALS

S. Conf. Rep. No. 104-230 (1996) 3

OTHER MATERIALS

Brief for the FCC and the United States, *Verizon Communications, Inc. v. FCC*, Nos. 00-511 *et al.* (U.S. filed Nov. 17, 2000) 15

Brief for the Federal Respondents, *WorldCom, Inc. v. USTA*, No. 02-858 (U.S. filed Feb. 5, 2003) 15

Brief in Opposition for Time Warner Entertainment Co. and AT&T Corp., *Consumer Fed'n of Am. v. FCC*, No. 01-223 (U.S. filed Nov. 2, 2001) 1, 14

66 Fed. Reg. (2001):

p. 46763 19

p. 46767 19

Petition for a Writ of Certiorari, *AT&T Corp. v. Iowa Utils. Bd.*, No. 00-590 (U.S. filed Oct. 13, 2000)..... 15

Solicitor General Authorizes FCC To Represent Itself in Appeal, Reuters (June 9, 2004) 13

PRELIMINARY STATEMENT

Petitioners raise two sets of issues. Neither merits plenary review by this Court.

First, petitioners claim that the D.C. Circuit wrongly invalidated the FCC's third attempt to impose the same "blanket" unbundling requirements for narrowband facilities that this Court vacated in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) ("*IUB*"). The FCC and the United States, however, have decided *not* to seek review of that ruling. As petitioner AT&T has itself argued in similar circumstances, "[i]f the expert agency charged with administering [a particular regulatory issue] has determined that the court of appeals' decision does not undermine its programmatic objectives to such an extent as to warrant further review, then there is no cause for this Court to conclude otherwise."[1] That is precisely right, and it accords with this Court's consistent practice. Indeed, we are not aware of a single case — and petitioners do not cite one — in which this Court has granted review of a decision invalidating a federal agency rule where the government itself did not seek review.

Moreover, the FCC has stated that it intends to adopt new narrowband unbundling rules by December 15 of this year. The rules at issue here may thus be supplanted before this Court could even hear this case, much less decide it on the merits. There is no reason for the Court to address issues that are slated to become moot before a decision can be reached.

Even aside from these threshold considerations, the judgment below does not merit review. Petitioners argue that, when Congress assigns a specific task to a federal agency, that agency remains free to subdelegate its responsibility to a state agency that is not accountable to Congress. Simply put, in petitioners' view, every time Congress directs a federal agency to do something, it must add a "thou shalt not delegate" codicil to the statute or risk having the agency assign that task to representatives of a separate sovereign. The D.C.

---

[1] Br. in Opp. for Time Warner Entertainment Co./AT&T Corp. at 12, *Consumer Fed'n of Am. v. FCC*, No. 01-223 (U.S. filed Nov. 2, 2001).

Circuit properly rejected that facially untenable position, and not a single decision supports it.

AT&T and NARUC also challenge the D.C. Circuit's identification of specific flaws in the FCC's impairment analysis for these narrowband facilities. The questions they present, however, involve the routine application of settled principles of administrative law, such as an agency's obligation to consider alternatives raised by parties to a rulemaking proceeding and to provide an adequate and reasoned explanation for its choices.

Moreover, contrary to AT&T's assertion, the D.C. Circuit's analysis is entirely consistent with — indeed, largely dictated by — this Court's decisions. The D.C. Circuit's insistence that impairment decisions be made in the context of geographic markets follows directly from this Court's holding in *IUB* that Congress required the FCC to consider the availability of alternative facilities outside the incumbent local exchange carrier's network. *See* 525 U.S. at 389-90. One cannot rationally consider the availability of such alternatives without looking at a geographic market; otherwise, incumbents could be required to offer facilities in New York solely because there are no alternative facilities in rural Iowa. Likewise, *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002), makes plain that unbundling should be limited to true "bottleneck" facilities to encourage facilities-based competition in other facilities that competitors could provide themselves: as this Court stated, "entrants may need to share some facilities that are very expensive to duplicate . . . in order to be able to compete in other, more sensibly duplicable elements." *Id.* at 510 n.27. That understanding is wholly consonant with the D.C. Circuit's judgment here.

Second, petitioners raise a series of run-of-the-mine agency review issues on which the D.C. Circuit affirmed the determinations of the FCC. These issues arise primarily from the FCC's reasonable and fact-bound conclusions (1) that competitive local exchange carriers are for the most part not "impaired," within the meaning of 47 U.S.C. § 251(d)(2)(B),

without access to certain facilities used to provide high-speed "broadband" services (that is, services such as high-speed Internet access), (2) that any conceivable impairment can be addressed with limited unbundling and access to alternative equipment, and (3) that unbundling is contrary to the intent of Congress where, as here, the market is fully competitive and incumbent local exchange carriers are in fact secondary players. There is no compelling reason for this Court to review the D.C. Circuit's affirmance of such discrete, record-based agency judgments.

STATEMENT OF THE CASE

1. The Telecommunications Act of 1996 ("1996 Act") seeks to transform local telecommunications from a market characterized by exclusive franchises to one in which multiple providers compete to provide more efficient and innovative service over their own facilities. *See, e.g.*, S. Conf. Rep. No. 104-230, at 148 (1996) (finding that "meaningful facilities-based competition" is possible). Because Congress understood, however, that new entrants into local markets (known as competitive local exchange carriers or "CLECs") might not be able to duplicate immediately *every* aspect of a local telephone network, the statute allows them to obtain "*[s]ome* facilities and capabilities" from the incumbent local exchange carrier ("ILEC"). *Id.* (emphasis added). The piece-parts of the ILEC's network that must be shared are known as unbundled network elements or "UNEs." *See* 47 U.S.C. § 251(c)(3). As this Court has explained, access to some difficult-to-duplicate network elements may enhance facilities-based competition by allowing new entrants to compete using other, more-easily duplicated facilities of their own. *See Verizon*, 535 U.S. at 510 n.27 ("competition as to 'unshared' elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements").

The 1996 Act assigns to the FCC the job of identifying the "bottleneck" facilities, *id.* at 507, that are unsuitable for competitive supply and thus should be made available as

UNEs. Congress directed "*the Commission* . . . to establish regulations to implement the requirements of [§ 251]," including the provisions governing the UNEs that incumbents must make available to CLECs. 47 U.S.C. § 251(d)(1) (emphasis added). Furthermore, Congress specified that, "*[i]n determining what network elements should be made available* for purposes of" § 251(c)(3), "*the Commission* shall consider, at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.* § 251(d)(2)(B) (emphases added). Accordingly, the FCC has acknowledged that Congress "direct[ed]" the "Commission" to undertake the "analysis required to determine what network elements should be made available," App. 259a (¶ 179),[2] and thus that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations," App. 264a (¶ 187).

2. In its 1996 *Local Competition Order*,[3] the FCC exercised its § 251(d)(2) authority to determine what network elements should be made available, but it failed to confine its unbundling requirements to bottleneck facilities that could not reasonably be duplicated. Instead, it required access to *all* narrowband voice facilities *everywhere*.

This Court vacated these "blanket" unbundling rules in *IUB*. As the Court explained, the FCC erred in presuming that ILECs had a baseline duty to provide unbundled access to *all* network elements for which such access was technically feasible and that the "impairment" standard "merely permitt[ed] it to soften that obligation by regulatory grace." *IUB*, 525 U.S. at 391. The Court held that a finding of "impairment" is a prerequisite to unbundling and, moreover, that the statute "requires the Commission to determine on a rational basis *which* network elements must be made avail-

---

[2] "App." refers to the appendix to AT&T's certiorari petition.

[3] 11 FCC Rcd 15499 (1996) (subsequent history omitted).

able." *Id.* at 391-92. In applying that standard, the Court stated, the FCC (1) must consider whether competitors could engage in facilities-based competition by deploying or obtaining facilities from sources other than the incumbent, and (2) cannot treat any increase in cost considered in isolation as an "impairment." *See id.* at 389-90. In short, the statute places "clear limits" on the FCC's unbundling authority and requires it to adopt a "limiting standard" for unbundling that is "rationally related to the goals of the Act." *Id.* at 388, 397.

3. On remand from *IUB*, the FCC failed to heed this Court's directions. The FCC's then-Chairman dismissed this Court's decision as a mere "bump in the road,"[4] and the FCC proceeded to adopt blanket national unbundling rules that were substantively identical to the ones this Court had vacated. In a separate *Line Sharing Order*,[5] moreover, the FCC for the first time added to the UNE list facilities used exclusively in the highly competitive market for "broadband" services such as high-speed Internet access. *See USTA v. FCC*, 290 F.3d 415, 419-21 (D.C. Cir. 2002) ("*USTA I*") (describing the 1999 unbundling rules in detail), *cert. denied*, 538 U.S. 940 (2003).

On review of those decisions, a unanimous D.C. Circuit panel, applying the principles established by this Court's decision in *IUB*, vacated the FCC's second set of unbundling rules. The court of appeals held that the FCC's purportedly revised unbundling standard remained deficient in key respects. Among other things, the Commission had refused to make any geographic or product-market distinctions in determining whether, as this Court had required, alternative facilities are, or could reasonably be made, available. *See id.* at 422.

---

[4] William E. Kennard, Chairman, FCC, *Moving On*, Remarks Before the NARUC Winter Meeting, Washington, D.C. (Feb. 23, 1999).

[5] 14 FCC Rcd 20912 (1999) (subsequent history omitted).

The D.C. Circuit also invalidated the *Line Sharing Order* because the FCC focused exclusively on a single broadband technology — DSL — and failed to address the agency's own findings that the broadband market as a whole (which includes market-leading cable-modem providers) was already characterized by "robust competition" and was in fact "domina[ted]" by cable. *Id.* at 428.

Several private parties, but (as in this case) not the FCC or the United States, filed a petition for certiorari seeking review of the D.C. Circuit's *USTA I* decision. This Court denied that petition. *See WorldCom, Inc. v. USTA*, 538 U.S. 940 (2003) (No. 02-858).

4. Despite these two judicial vacaturs, and over a scathing dissent from FCC Chairman Powell, a 3-2 majority of the FCC declined yet again on remand to impose any meaningful limit on blanket nationwide unbundling of basic narrowband voice facilities.

The FCC majority reached that result in the teeth of an extensive record demonstrating that CLECs could provide, and in fact were providing, their own facilities in many markets around the country. Among other things, the record showed that more than 200 competitors had deployed in excess of 1,300 circuit switches that were being used — in wire centers covering 86% of Bell company lines — to serve more than 16 million lines, including 3 million residential lines. *See* C.A. App. 979; App. 980a (Powell Stmt.).[6] Similarly, in 49 of the top 50 markets in the country, there were five or more competitors self-providing high-capacity transmission facilities between switches, and competitors had deployed at least

---

[6] In addition, the record showed, there were approximately 9,500 CLEC "packet switches" that are increasingly being used to provide voice as well as data services, and incumbents were also facing extensive and rapidly increasing competition for both lines and minutes from wireless services. *See* Declaration of Robert D. Willig ¶ 88, attached to Comments of AT&T Corp., CC Docket Nos. 01-338 *et al.* (FCC filed Apr. 5, 2002) ("CLECs had deployed 9,524 data switches by 2001").

184,000 miles of such facilities. *See* C.A. App. 1021-22, 1182-201.

Despite the overwhelming evidence presented to the FCC, the state commissions, which the statute charges with *implementing* the FCC's unbundling rules, urged the FCC to delegate to them unrestricted authority to make the ultimate unbundling decisions.[7] The FCC majority did precisely that, leaving the state commissions free to perpetuate maximum unbundling. For both mass-market switching and high-capacity facilities (including both the transmission facilities that connect switches and the loops that connect switches to larger customers), the FCC adopted provisional findings of impairment designed to keep maximum unbundling in place temporarily. It then expressly "delegated" to 51 separate state commissions its duty under § 251(d)(2) to make the ultimate determination of which network elements must be made available. *See* App. 265a-268a (¶¶ 188-190). These state decisions were to be effective without any review or approval by the FCC. *See, e.g.*, App. 513a (¶ 426).

More particularly, for "mass-market" switching,[8] the FCC made a provisional finding of impairment pending the state determinations, based solely on supposed difficulties with the "hot-cut" process by which a loop (the wire or equivalent facility running from a switch to an end-user's premises) is transferred from an incumbent's switch to a competitor's switch. App. 507a (¶ 422). The FCC barely acknowledged

---

[7] Ex Parte Letter from David A. Svanda, President, NARUC, *et al.*, to Michael Powell, Chairman, FCC, *et al.* (Nov. 20, 2002) (attaching letter from representatives of 34 state commissions seeking to retain the authority to impose unbundling without "[a]ny restriction" on their ability to do so) (C.A. App. 1707).

[8] The "mass market" generally includes residential and small-business customers. The FCC did not require switch unbundling for generally larger-business "enterprise" customers, but the record here demonstrated that that covered a miniscule fraction of all switched lines. *See* C.A. App. 624.

that it had previously approved hot-cut processes in virtually every state (and the District of Columbia), nor did it consider whether other mechanisms that had been suggested by commenters could address supposed hot-cut problems without the need for unbundling on a nationwide basis.

The FCC then gave state commissions nine months to determine whether to mandate switch unbundling on a permanent basis. During that time, state commissions were to apply a two-stage analysis. First, the state commissions were to find "no impairment" when either "three or more unaffiliated competing carriers each is serving mass market customers in a particular market with the use of their own switches" or "two competitive wholesale providers" of switching are serving the market. App. 606a, 610a (¶¶ 501, 505). Any semblance of objectivity to this test was undermined by the fact that the FCC left it completely to the states to "define the markets in which they will evaluate impairment." App. 599a (¶ 495). If this first test was not satisfied, the states were next to determine the potential ability of CLECs to deploy their own switches based on what FCC Chairman Powell, in dissent, called a "shot-gun blast of every imaginable economic criterion." App. 973a (Powell Stmt.); *see* App. 611a-630a (¶¶ 506-520). In sum, the FCC's Order "let[] the states make crucial decisions regarding market definition and application of the FCC's general impairment standard . . . , with FCC oversight neither timely nor assured." App. 13a-14a.

The FCC employed a similar strategy for transport facilities and high-capacity loops. Although the Commission did not dispute that competitors had deployed these facilities in many markets, it nevertheless made provisional findings of *nationwide* impairment on the ground that it could not determine the *specific routes* on which CLECs had deployed such facilities. *E.g.*, App. 385a-386a (¶ 314).

The FCC then again delegated to the states the authority to make the ultimate unbundling determinations according to another two-stage inquiry. At the first stage, states were to

grant relief from unbundling only if multiple alternative providers had already deployed facilities on a specific point-to-point route. *E.g.*, App. 400a (¶ 329). At the second stage, states were to use their "analytical flexibility" to consider a long series of factors and determine whether CLECs could deploy facilities at locations where they have not already done so. *E.g.*, App. 405a (¶ 335). In the FCC's own words, its Order "provide[d] no guidance on how these various factors are to be assessed and weighed." App. 509a (¶ 425 n.1300).

In contrast to its decision to maintain maximum unbundling for traditional narrowband voice facilities, the FCC decided to impose limited unbundling obligations on most facilities used to provide high-speed broadband services. For example, subject to a transition period, the Commission freed incumbents from the obligation to offer "line sharing" — that is, access only to the high-frequency portion of the loop used to provide high-speed DSL service — as an unbundled network element. Contrary to the suggestions in the petitions, *e.g.*, Cal. Pet. 13, the Commission determined that CLECs are not impaired within the meaning of § 251(d)(2) without line sharing. *See* App. 327a-330a (¶¶ 258-260). Even beyond that finding, the Commission concluded that, given the extensive intermodal competition (primarily from cable-modem providers, but also from wireless, satellite, and power lines), competition in the broadband market was not dependent on unbundling, and, moreover, mandating unbundling would in fact decrease facilities-based competition, in conflict with a core goal of the 1996 Act. *See* App. 331a-332a (¶¶ 261-263).

The Commission likewise found that CLECs are not impaired without access to the next-generation fiber to the home (or "FTTH") facilities that can support a broad range of broadband technologies including video-on-demand and high-speed data transmission. *See* App. 342a (¶ 273). The FCC concluded that these facilities were just beginning to be deployed and that ILECs had no inherent advantage over

CLECs in being able to bring these new technologies to consumers. *See* App. 343a-345a, 349a (¶¶ 274-275, 279) ("competive LECs have demonstrated that they can deploy FTTH loops and are doing so"). The Commission further explained that, because § 251(d)(2) specifies that impairment is a "minimum" prerequisite for unbundling and because § 706 of the 1996 Act requires the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans," its judgment was necessarily "informed" by its finding that requiring unbundling would create disincentives for investment in this new technology. *See* App. 341a-342a, 348a (¶¶ 272, 278). The FCC did require, however, that, where an ILEC deploys fiber to the home to existing customer locations, it must make available a narrowband voice channel to CLECs over either an existing copper facility or the new fiber. *See* App. 346a (¶ 277).

Finally, with respect to hybrid loops (that is, those containing both fiber and copper), the Commission found some limited impairment, but balanced against that finding (1) its conclusion that alternative unbundling requirements offer suitable alternatives that "adequately address[]" whatever limited impairment may exist, (2) the effect of unbundling on facilities investment, and (3) the existence of intermodal alternatives for consumers and the fact that "broadband services . . . are currently provided in a competitive environment" in which cable companies have "a leading position." App. 353a-354a, 357a-360a (¶¶ 286, 291-292). Given these factors, the Commission determined that limited unbundling was appropriate: ILECs would be required to provide a narrowband transmission path to CLECs, but not to turn broadband capabilities over to their competitors. App. 362a-363a (¶¶ 295-296).

5. On review, the D.C. Circuit (Williams, J., joined by Edwards and Randolph, JJ.) again unanimously vacated the FCC's rule re-imposing blanket unbundling of narrowband facilities, but affirmed the FCC's rule imposing limited unbundling of broadband facilities.

The D.C. Circuit vacated the FCC's narrowband unbundling determinations for several independent reasons. First, the court held that it was inconsistent with Congress's explicit assignment of unbundling authority to the FCC for the federal agency to subdelegate its responsibility for final unbundling decisions to state agencies that are not accountable to federal authorities. *See* App. 9a-16a. The court noted that the FCC itself "acknowledge[d]" that, in § 251(d)(2), Congress "instruct[ed]" the *federal agency*, not the state commissions, to "'determin[e]' which network elements shall be made available to CLECs on an unbundled basis." App. 9a (quoting 47 U.S.C. § 251(d)(2)). In light of that express congressional assignment, the FCC had a statutory duty to make the ultimate unbundling determinations, and there was no presumption that the FCC could subdelegate that duty to the states. *See* App. 10a.

Independent of this delegation issue, the D.C. Circuit concluded that the FCC's Order suffered from multiple failures of reasoned decisionmaking. *See* App. 16a-32a. The court concluded, for example, that the FCC's prior approvals of ILEC hot-cut processes created substantial "doubt that the record supports a national impairment finding for mass market switches" on this basis. App. 18a. In addition, the FCC had not "articulated any reasonable explanation" for rejecting more tailored alternatives to switch unbundling that commenters had raised and that would appear to have resolved any supposed hot-cut difficulties. App. 20a-21a. Similarly, the court concluded that the FCC had violated basic precepts of administrative rationality in "simply ignor[ing] facilities deployment along similar routes" in requiring transport and high-capacity loops to be unbundled. App. 28a (agency had failed to "explain" this conclusion). The FCC's Order also "ma[de] no attempt" to explain how it was consistent with the "purposes of the Act" to base an impairment determination on a finding that state-regulated retail rates were too low to permit profitable entry. App. 24a. Finally, the FCC's impairment inquiry had failed to "consider" the fact that, in cer-

tain instances, CLECs were competing successfully using incumbent facilities obtained under tariffs. App. 31a-32a.

As to the FCC's decision to limit unbundling of broadband facilities, the D.C. Circuit found that the FCC had acted rationally based on the record evidence before it as to each of these issues and had relied on a permissible understanding of the statute. The court held that the FCC had "reasonably" understood the statute to permit the agency to consider the investment-dampening effects of unbundling and the fact that alternative unbundling requirements would "mitigate" any CLEC impairment. App. 35a-42a. The court concluded that the FCC's decision on FTTH loops was sufficiently "buttressed by the evidence in the record" as to investment effects and thus found it unnecessary to decide whether the record also supported the FCC's no-impairment conclusion. App. 43a-44a. The court also held that the FCC reasonably concluded that "line sharing is not essential to maintain robust competition in this market, a conclusion based on permissible considerations and supported by evidence in the record." App. 46a-47a. Finally, the court agreed with the Commission's conclusion, "supported by very strong record evidence," that the broadband market is characterized by "robust intermodal competition from cable providers" and that imposing unbundling obligations on ILECs, the secondary players in that market, is not warranted given that "intermodal competition from cable ensures the persistence of substantial competition." App. 41a, 47a.

On May 24, 2004, the FCC majority (but not the United States), joined by the CLECs and the state commissions, asked the D.C. Circuit to stay its mandate pending the filing and disposition of petitions for certiorari. On June 4, 2004, the D.C. Circuit unanimously denied the stay motions.

On June 9, the Solicitor General announced that he would not seek either a stay of the D.C. Circuit's mandate or a writ of certiorari from this Court, although he authorized the FCC

to proceed in its own name if it so chose.[9] The FCC, however, likewise decided not to seek review of the D.C. Circuit's decision, electing instead to proceed to adopt new rules.[10]

On June 10, 2004, NARUC and the same CLECs that now seek certiorari filed applications with the Chief Justice seeking a stay of the D.C. Circuit mandate. On June 14, the Chief Justice denied those applications.

6. On August 20, 2004, the FCC adopted interim rules to govern narrowband unbundling and issued a *Notice of Proposed Rulemaking* seeking comments on permanent rules. The interim rules will be in effect for six months.[11] The FCC has scheduled a meeting to adopt permanent new rules on December 15, 2004.

REASONS FOR DENYING THE PETITIONS

I. THE D.C. CIRCUIT'S INVALIDATION OF THE FCC'S REIMPOSITION OF BLANKET NARROWBAND UNBUNDLING DOES NOT MERIT REVIEW

The D.C. Circuit's decision vacating the FCC's imposition of unbundling requirements for mass-market switching and high-capacity facilities is correct, is consistent with this Court's precedents, and conflicts with no decision of any other court of appeals. Plenary review is not warranted.

---

[9] Press Release, FCC, *Office of Solicitor General Will Not Appeal DC Circuit Decision* (June 9, 2004); *Solicitor General Authorizes FCC To Represent Itself in Appeal*, Reuters (June 9, 2004).

[10] Press Release, FCC, *FCC Chairman Michael K. Powell Announces Plans for Local Telephone Competition Rules* (June 14, 2004).

[11] Because the FCC's interim rules, in effect, merely reinstate the blanket unbundling rules struck down previously by this Court and twice by the D.C. Circuit, they amount to a self-granted stay of the D.C. Circuit's mandate, a stay that both the D.C. Circuit and this Court declined to grant. Accordingly, some of the respondents have filed a petition for a writ of mandamus with the D.C. Circuit seeking to have the interim rules vacated. That petition is pending.

A. Although petitioners claim that the decision below will significantly impede the FCC's administration of the 1996 Act, both the Solicitor General and the FCC have reached a different judgment and have decided *not* to seek review of the decision themselves. If neither the federal agency charged with administering the 1996 Act nor the government's chief representative in this Court believes that the effect of the court of appeals' decision is sufficiently deleterious to warrant filing a petition for a writ of certiorari, there is no reason for this Court to grant plenary review at the behest of other parties. As noted above, AT&T, a petitioner here, has itself argued in an analogous context that there "is no cause for this Court" to grant review where an agency has declined to seek certiorari from a circuit court decision vacating the agency's rules.[12]

That analysis is correct, and it is dispositive of the petitioners' contrary arguments here. If the D.C. Circuit's decision in fact "reversed the basic premise of the [1996] Act," "immensely complicate[d] the task" before the FCC, or required determinations that the FCC "cannot possibly make," NARUC Pet. 22, 24, 25, surely the FCC and the United States would have sought review in this Court. Instead, they decided against filing a certiorari petition, and the FCC, as discussed further below, has initiated a proceeding to adopt new rules that comply with the D.C. Circuit's mandate by the end of the year.[13]

---

[12] Br. in Opp. for Time Warner Entertainment Co./AT&T Corp. at 12, *Consumer Fed'n of Am. v. FCC*, No. 01-223 (U.S. filed Nov. 2, 2001).

[13] In this regard, petitioners are wrong to suggest that the court of appeals has required the FCC, on remand, to make "hundreds of thousands of discrete judgments" as to the particular circumstances in individual markets. NARUC Pet. 24. As the FCC has already acknowledged (*see* App. 204a (¶ 121)), the 1996 Act and the D.C. Circuit's decisions simply require the Commission to draw reasonable lines determining the classes of markets that are suitable for competitive supply.

Indeed, we are aware of *no* analogous case (and petitioners have cited none) in which this Court granted certiorari to review a lower court decision striking down an agency rule despite the fact that the agency itself chose not to seek review. In *Verizon*, for example, the Court granted certiorari limited to the questions presented by the government and declined review of other questions on which the government lost below and that were presented only by AT&T and WorldCom.[14] The Court declined plenary review of those questions even though the Solicitor General, on behalf of the United States and the FCC as respondents, urged the Court to grant review.[15] Similarly, the Court denied the request of AT&T and other CLECs to review the D.C. Circuit's decision in *USTA I* after the FCC and the United States declined to petition for certiorari from that decision. *See* 538 U.S. 940 (2003) (No. 02-858).

B. There is even less reason to grant plenary review where, as here, the responsible agency has stated that it intends to adopt new rules by the end of this year to replace those that the D.C. Circuit vacated. *See supra* pp. 1, 13. As the Solicitor General previously explained in similar circumstances, the impending issuance of new rules means that review by this Court is "not necessary" and "would not be an efficient use of judicial or agency resources."[16]

C. Even apart from these considerations, there is no basis for plenary review of the D.C. Circuit's judgment.

1. NARUC's lead argument rests on the following unlikely proposition: when Congress enacts a statute (or at least a statute with some elements of "cooperative federal-

---

[14] Petition for a Writ of Certiorari at 21-24, *AT&T Corp. v. Iowa Utils. Bd.*, No. 00-590 (U.S. filed Oct. 13, 2000); *AT&T Corp. v. Iowa Utils. Bd.*, 531 U.S. 1124 (2001) (No. 00-590).

[15] Br. for FCC and United States at 16-21, *Verizon Communications, Inc. v. FCC*, Nos. 00-511 *et al.* (U.S. filed Nov. 17, 2000).

[16] Br. for Fed. Resp. at 14, 16-17, *WorldCom, Inc. v. USTA*, No. 02-858 (U.S. filed Feb. 5, 2003).

ism") specifically assigning certain tasks to a federal agency, that agency is nonetheless free to abdicate its congressionally assigned responsibilities and delegate ultimate decision-making authority instead to 51 separate state agencies. *See* NARUC Pet. 15-21; *see also* AT&T Pet. 28-30. That remarkable view finds no support in the precedent of this or any other federal court. The D.C. Circuit's decision to reject it is correct and does not raise a significant question meriting this Court's review.

As this Court has explained, the 1996 Act creates a "*federal* regime" governing local telecommunications competition and, as to the matters it covers, takes the "regulation of local telecommunications competition away from the States." *IUB*, 525 U.S. at 378 n.6; *see id.* (a federal regime "administered by 50 independent state agencies" would be "surpassing strange"); *id.* at 385 n.10 ("we are aware of no . . . instances in which federal policymaking has been turned over to state administrative agencies").

The federal nature of this new regime is particularly clear in the unbundling provisions at issue here. Congress explicitly assigned to a single federal agency, not to state commissions, the obligation to decide which facilities should be unbundled under the 1996 Act. As the D.C. Circuit explained, § 251(d)(2) requires that the *FCC* "'determin[e]' which network elements shall be made available to CLECs on an unbundled basis." App. 9a (quoting § 251(d)(2)). Moreover, Congress required the FCC to adopt any necessary unbundling obligations within six months of the statute's enactment, *see* § 251(d)(1), in time for the state commissions to apply those binding determinations in arbitration proceedings, which have a nine-month deadline, *see* § 252(b)(4)(C). In those arbitrations, state commissions are required to adhere to "the regulations prescribed by the [FCC] pursuant to section 251," § 252(c)(1), including the unbundling determinations that the FCC is required to make under § 251(d).

For these reasons, the FCC itself concluded that Congress "direct[ed] the *Commission* to perform" the "analysis required to determine what network elements should be made available." App. 259a (¶ 179) (emphasis added). By contrast, the FCC explained, the 1996 Act gave the states *no* power to determine the facilities that should or should not be unbundled: "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations," App. 264a (¶ 187); *compare* NARUC Pet. 18 (stating incorrectly, and in conflict with the FCC's own position, that the federal statute grants unbundling authority to the states).[17]

By vacating the FCC's purported delegation of ultimate unbundling authority, the D.C. Circuit simply held that the 1996 Act means what it says when it assigns unbundling duties to the FCC, and that there is no "presumption" that a federal agency assigned a task by Congress may cede that duty to an instrumentality of a separate sovereign. *See* App. 10a. On the contrary, as the D.C. Circuit explained, "when an agency delegates power to outside parties" — particularly, as in this case, to separate sovereigns outside the federal system of checks and balances — "lines of accountability may blur, undermining an important democratic check on government decision-making" and "aggravat[ing] the risk" that the policy goals reflected in the "underlying statutory scheme" will remain unfulfilled. App. 10a-11a (citing *Printz v. United States*, 521 U.S. 898, 922-23 (1997)).

In challenging that conclusion, petitioners rely almost exclusively on two cases, *Batterton v. Francis*, 432 U.S. 416 (1977), and *Wisconsin Department of Health & Family Services v. Blumer*, 534 U.S. 473 (2002). They wrongly assert that these cases — which no party even cited in merits

---

[17] The unbundling provisions of the 1996 Act stand in marked contrast to other statutory sections, such as § 252(d), that expressly assign *other* statutory "determinations" to the states. *See* App. 15a-16a (noting that, although "other provisions of the statute carefully delineate a particular role for the state commissions," the unbundling provisions "do[] not").

briefing before the D.C. Circuit — are controlling on this issue and "conflict[]" with the court of appeals' ruling. *See* NARUC Pet. 18. In neither case did the federal agency purport, as the FCC did here, to delegate to the states a responsibility that Congress expressly assigned to it, much less did the Court establish the broad presumption that petitioners champion.

In *Batterton*, the relevant statute made certain governmental benefits turn on a state's decision that a child had been deprived of parental support because of "'the unemployment (as determined in accordance with *standards* prescribed by the Secretary)'" of the child's parent. 432 U.S. at 418 n.2 (quoting 42 U.S.C. § 607(a)) (emphasis added). The statute thus anticipated that "the power to 'determine' unemployment [would] remain[] with the States," and that the Secretary would merely adopt relevant "standards" for the states to use. *Id.* at 430. The Secretary did precisely what the statute required of him. He created the relevant standards, which allowed the states some leeway to determine whether particular individuals were unemployed. The Court accordingly held that the Secretary had fulfilled his statutory duty. *See id.* ("we conclude that the power to prescribe 'standards' gives the Secretary sufficient flexibility to recognize some local options").

The Court's result turned, therefore, on the *specific terms of the statute*, which required limited action by the Secretary — action that the Secretary had carried out — and reserved for the states the duty to "determine" whether the parent was unemployed. The Court specifically emphasized that if, instead of requiring the Secretary simply to adopt standards governing unemployment, Congress had said that unemployment must be "defined by the Secretary," the statute would have required the Secretary to make a specific determination and would have "*preclud[ed]*" any contrary local policies. *Id.* (emphasis added).

The circumstances here perfectly fit the hypothetical that *Batterton* distinguished. In contrast to *Batterton*, where Congress asked the states to make the relevant "determin[ations]," the 1996 Act expressly requires *the FCC* to "determin[e]" what UNEs must be made available, as the FCC has correctly acknowledged. *See* 47 U.S.C. § 251(d)(2); *see also* App. 9a; App. 259a, 264a (¶¶ 179, 187). And, unlike the Secretary in *Batterton*, the FCC did not even arguably do what the statute required of it. Instead, it expressly shifted to the states the functions that Congress assigned to the FCC in § 251(d)(2). *See, e.g.*, App. 265a-268a (¶¶ 188-190). Far from approving of such a result, *Batterton* makes clear that, where Congress directs a federal agency to do something (whether to define "unemployment" or to determine which network elements must be made available), it is that federal body, not 51 separate states agencies, that must carry out the responsibility.

Petitioners' reliance on *Blumer* is similarly misplaced. There, the federal program required the states to establish plans for implementing a certain Medicaid program and to do so in accordance with federal regulations. *See* 534 U.S. at 479. The Secretary had indicated that, with respect to a technical issue (involving the allocation of income between spouses for purposes of program eligibility), states could legitimately employ more than one methodology because the statute did not "'clearly requir[e]'" the use of a single mechanism. *Id.* at 484-85 (quoting 66 Fed. Reg. 46763, 46767 (2001)) (alteration in original). *Blumer* held only that the methodology used in one state (Wisconsin) was not inconsistent with the statutory language, *see id.* at 489-95, and noted in dicta that, as the Secretary had suggested, other approaches might be consistent as well, *see id.* at 495 (not "definitively resolv[ing] th[e] matter" but noting that such "leeway" was "characteristic of Medicaid").

Again, *Blumer* does not suggest that the Secretary could ignore a statutory directive to take a specific action. On the contrary, the Court stressed that the relevant statute allowed

each state to "strike its own balance in the implementation of the Act," *id.* at 497 (internal quotation marks, brackets omitted), a sharp contrast to the unbundling provisions of the 1996 Act, which, the FCC itself has stated, "direct[]" the FCC to perform the relevant task. App. 259a (¶ 179).

There is also no basis for the claim, raised by NARUC alone, that the D.C. Circuit's decision conflicts with two Ninth Circuit decisions. The D.C. Circuit fully explained why one of those cases, *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983), does not support the FCC's subdelegation theory. *See* App. 13a. The Ninth Circuit specifically concluded that in the relevant statutes *Congress* had authorized the federal agency to precondition federal grants of rights-of-way through Indian reservations on tribal consent, so, unlike here, there was no issue of an agency delegating to another sovereign a responsibility that Congress had not authorized the agency to delegate. *See* 700 F.2d at 554. Moreover, the Ninth Circuit made plain that the federal agency there was not "relinquish[ing] . . . [its] final authority to approve" the right-of-way applications. *Id.* at 556; *see* App. 13a. Again, that is in marked contrast to this case, where the FCC has authorized states to make final unbundling decisions that will become effective without any review by the FCC. *See* App. 13a, 15a.

In the other case, *Vierra v. Rubin*, 915 F.2d 1372 (9th Cir. 1990), the Ninth Circuit found that the state's actions were inconsistent with the statute, rendering immaterial the question whether states could ever exercise the authority at issue. *See id.* at 1378. Even in dicta, the Ninth Circuit said only that the agency's delegation to the states of the authority to define a statutory term was "not impermissible per se" in light of the "breadth of discretion granted to states" by Congress in the AFDC program. *Id.* at 1377-78 (internal quotation marks omitted). Here, Congress did not grant broad discretion to the states with respect to unbundling, but instead specifically assigned that responsibility to the FCC.

2. Even if there were substance to petitioners' attack on the D.C. Circuit's delegation decision, that argument alone would not be a basis for reinstating the FCC's rules. Rather, this Court would also be required to review and reverse the D.C. Circuit's ordinary administrative-law determinations that the FCC's rules were arbitrary, insufficiently explained, and/or contrary to the statute. These include the D.C. Circuit's finding that the FCC failed to reconcile its prior approvals of ILEC hot-cut processes, to consider narrower alternatives to unbundling (such as rolling hot cuts) that had been raised in the record, to explain how lack of CLEC entry in markets with below-cost retail rates can be understood to result from "impairment," to draw any rational inferences from the ability of carriers to deploy facilities on similar routes for high-capacity facilities, and to consider the fact that carriers already were successfully providing high-capacity services without access to UNEs by using tariffed services instead. *See* App. 19a-21a, 27a-32a. Those decisions involve applications of settled principles of administrative law, and there is no reason for this Court to grant review as to them. *See generally Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951) (lower courts should determine whether agency determinations are supported by the record created in a particular case, and this Court's power to review "ought seldom to be called into action").

In arguing to the contrary, petitioners assert that, for years, the D.C. Circuit has been disregarding binding precedent from this Court interpreting the 1996 Act. In particular, they claim that the D.C. Circuit's decisions here and in *USTA I* are inconsistent with *IUB* and *Verizon*, both of which predate those court of appeals decisions and which the court of appeals has in fact considered at length. *See, e.g., USTA I*, 290 F.3d at 424-29.

That argument lacks substance. Petitioners wrongly assert that this Court's decisions compel federal courts to rubber-stamp essentially any unbundling regime the FCC adopts, no matter how extreme the result or how arbitrary or un-

explained the agency's reasoning. *See* AT&T Pet. 22-25. But far from deferring to the FCC's views on these issues, this Court *vacated* the FCC's unbundling rules in *IUB*. 525 U.S. at 397; *compare* AT&T Pet. i, 2 (suggesting wrongly that the D.C. Circuit's decisions are grounded in conclusions adopted only by Justice Breyer). The Court did so because, among other things, the FCC did not consider whether CLECs could obtain facilities from sources other than the ILEC and because the FCC's decision did not impose a "*limiting* standard" that was "rationally related to the goals of the Act." 525 U.S at 388-89 (emphasis added). Thus, although the Court did determine that the 1996 Act can be read to give CLECs "most promiscuous rights" in *other* respects, *id.* at 397, the Court emphasized (in the very same paragraph) that § 251(d)(2) placed "clear limits" on the FCC's authority with respect to unbundling, *id.*

Although petitioners disparage the D.C. Circuit's insistence that impairment findings must be based on appropriate geographic and product markets, *see* AT&T Pet. 25-26, that conclusion follows directly from this Court's judgment that the Commission could not "blind itself to the availability of elements outside the incumbent's network." *IUB*, 525 U.S. at 389. As we discussed above, *see supra* p.2, one cannot rationally determine whether alternative facilities are, or reasonably can be made, "available" outside the network without reference to a relevant market. *See* App. 27a ("Any process of inferring impairment (or its absence) from levels of deployment depends on a sensible definition of the markets in which deployment is counted."). Thus, far from imposing an "extra-statutory" requirement, *see* AT&T Pet. i, 7,[18]

---

[18] Contrary to AT&T's claim, the D.C. Circuit did not hold that it was "not enough that the FCC was 'adhering' to a permissible construction of the 'letter' of § 251(d)(2)." AT&T Pet. 24 (quoting *USTA I*, 290 F.3d at 429). Rather, the court in *USTA I* found the FCC's claim that it was adhering to the statute by considering only one technology used to offer broadband service — and ignoring other competing technologies — to be

the D.C. Circuit's determination is firmly rooted in this Court's authoritative interpretation of the text of the 1996 Act.

Beyond this, petitioners are simply mistaken in contending that this Court has embraced unrestrained unbundling. *See* AT&T Pet. 24-26. As noted, *IUB* vacated the FCC's initial rules precisely because, if Congress had intended to authorize "blanket" and "unrestricted" access to UNEs, "it would not have included § 251(d)(2) in the statute at all." 525 U.S. at 390. *Verizon* likewise establishes that UNE availability is properly limited to true "*bottleneck*" facilities in order to enable facilities-based competition in other, more-easily duplicated facilities. The Court thus explained that "competition as to 'unshared' elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements . . . . In this case, low prices for the elements to be leased become crucial in inducing the competitor to enter and build." 535 U.S at 510 n.27; *see id.* at 502 n.20.

Furthermore, nothing in this Court's decisions precludes the D.C. Circuit from undertaking its ordinary function of reviewing the FCC's determinations to ensure that they are adequately reasoned. That is the everyday work of the D.C. Circuit, and there is no reason for this Court to review the D.C. Circuit's case-specific application of settled principles of administrative law.

For example, the D.C. Circuit's conclusion that the FCC had not "articulated any reasonable explanation" for rejecting more tailored alternatives to switch unbundling, App. 20a-21a, is the sort of decision that courts of appeals make routinely in cases where an agency's decision does not provide a rational basis for its conclusion. Although AT&T (at 26) again wrongly derides the D.C. Circuit's decision as "extra-

---

"quite unreasonable" and thus unsustainable under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *See* 290 F.3d at 429.

statutory," this Court has long established that agencies may not simply ignore reasonable alternatives that were raised by parties to the agency proceeding and that would serve the purposes of the relevant statute. *See, e.g., Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment."). Given the FCC's own recognition that "unbundling is one of the most intrusive forms of economic regulation" and "one of the most difficult to administer," App. 223a (¶ 141), it was hardly inconsistent with established principles of administrative law or with the decisions of this Court to require the FCC to consider alternatives that would obtain the same benefits as unrestricted unbundling without the same costs.

The D.C. Circuit's similar conclusion that the FCC must "consider[]" the availability of tariffed alternatives to UNEs, App. 31a-32a, again flows from this Court's decisions — which, as noted, indicate that unbundling is not to be applied where CLECs have competed successfully using facilities derived through alternative means. *See IUB*, 525 U.S. at 389-90 & n.11 (explaining that, even if there is a difference in cost, CLECs are not "impaired" within the meaning of the statute so long as they can still compete using alternative facilities). In arguing otherwise, AT&T simply disregards this Court's holding on that point. *See* AT&T Pet. 26-27.[19]

Finally, the D.C. Circuit's conclusion that the FCC failed to provide any explanation "connect[ing]" the existence of

---

[19] AT&T wrongly claims (at 27) that the Eighth Circuit decided an indistinguishable issue in *Iowa Utilities Board v. FCC*, 120 F.3d 753, 809 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). But, as the D.C. Circuit properly understood, the Eighth Circuit's discussion dealt with the definition of a "network element," not the distinct question of the proper impairment inquiry (an issue on which this Court reversed the Eighth Circuit). *See* App. 31a.

below-cost retail prices to "impairment" or the "purposes of the Act," App. 24a, not only follows directly from this Court's statements that a proper unbundling standard must further the goals of the Act, *see IUB*, 525 U.S. at 388, but also simply requires the sort of rational agency analysis and explanation that courts routinely demand of agencies. Simply put, the D.C. Circuit required the FCC to explain why it was reasonable and consistent with statutory purposes to mandate unbundling on the theory that CLECs are impaired, not because they cannot reasonably duplicate the facilities at issue, but because state-regulated retail rates are artificially low. *See* App. 24a-25a (explaining that the FCC has "said nothing" that "locate[s] its treatment of th[is] issue in any purposeful reading of the Act"). AT&T's petition does not explain why such an ordinary administrative-law determination merits review, particularly when the court of appeals merely insisted on compliance with this Court's own conclusion that a proper impairment standard must accord with the purposes of the Act.

II. THE D.C. CIRCUIT'S AFFIRMANCE OF THE FCC'S DECISION LIMITING UNBUNDLING OF COMPETITIVE BROADBAND FACILITIES DOES NOT MERIT REVIEW

Petitioners also take issue with the D.C. Circuit's affirmance of the FCC's decision to require only limited unbundling of the facilities ILECs use to provide service in the highly competitive market for broadband services. They again present no issue warranting plenary review.

A. As an initial matter, it is important to understand that, contrary to the impression the petitions seek to leave, the FCC found that CLECs were *not* impaired without UNE access to most of the broadband facilities at issue here. *See* App. 327a-330a (¶¶ 258-260) (line sharing), 342a-346a (¶¶ 273-276) (FTTH loops). And, in the one instance where the FCC found that some limited impairment may exist (hybrid loops), it concluded, among other things, that access to

alternative facilities "adequately addresses the impairment that competitive LECs face," App. 357a (¶ 291), and it still imposed some unbundling obligations to allow CLECs to obtain access to transmission facilities for traditional narrowband voice calls, *see* App. 353a (¶ 286).

These discrete record-based determinations do not merit review by this Court. In each instance, the FCC weighed the evidence of impairment and found, based on its review of the record, either that impairment did not exist or that it could be addressed through alternative arrangements and limited unbundling requirements. Furthermore, the FCC reasonably concluded that the competitive context — including the dominant market position of cable providers as well as alternative providers such as fixed wireless — ensured that consumers would continue to benefit from robust competition without unbundling, in which case there is no basis for imposing the costs of mandatory access to ILEC facilities. There is no reason for the Court to grant review as to such case-specific technical determinations involving application of the impairment standard to specific kinds of facilities.

B. In addition to its impairment findings, the FCC *also* concluded that requiring unbundling of these broadband facilities would discourage facilities-based competition, in conflict with the core goals of the 1996 Act and the specific congressional intent reflected in § 706 of the 1996 Act, which by its terms requires the Commission to take actions that promote deployment of advanced telecommunications capabilities. *See* 47 U.S.C. § 157 note (Commission "shall encourage the deployment ... of advanced telecommunications capability ... by utilizing ... measures that promote competition in the local telecommunications market[] or other regulating methods that remove barriers to infrastructure investment"). Because § 251(d)(2) makes impairment a "minimum" consideration, the FCC reasonably interpreted the statute to, at the least, permit it to consider the congressional policy in favor of facilities deployment set forth in § 706 in determining whether facilities should be unbundled.

See App. 249a-250a (¶ 173). The Commission concluded that Congress's goal of encouraging facilities deployment further weighed against mandating unbundling of specific broadband facilities. *See, e.g.*, App. 348a (¶ 278).

Thus, contrary to AT&T's claim, to the extent that investment incentives provided a justification to limit broadband unbundling, that is because the FCC, *not* the D.C. Circuit, reasonably interpreted the statute to authorize consideration of that issue. *Compare* AT&T Pet. 15-22 (discussing this issue in terms of the "holding[s]" and "conclu[sions]" of the "D.C. Circuit" and disregarding the FCC findings that the D.C. Circuit affirmed) *with* App. 35a-37a (affirming *the FCC's* interpretation as "reasonabl[e]"). The D.C. Circuit's conclusion that the FCC properly read the "at a minimum" clause of § 252 together with § 706 to authorize consideration of effects on facilities-based competition thus involves the application of standard *Chevron* principles and does not warrant review.

Nor is there any plausible claim that the D.C. Circuit, in affirming the FCC's reading of the statute, disregarded this Court's decisions in *IUB* and *Verizon*. *Compare* AT&T Pet. 16-19; *see also* Cal. Pet. 17-19. Neither of those cases involved the distinct policy issues raised by unbundling of the new high-speed broadband facilities in which both ILECs and CLECs are investing today (as opposed to legacy voice-only facilities). Thus, neither case involved application of § 706 and the interplay between that provision and the "at a minimum" language in § 251(d)(2). Moreover, in this case, the FCC has itself concluded, based on substantial evidence in the record, that requiring unbundling of these next-generation facilities will impede investment. *See, e.g.*, App. 348a-349a (¶ 278 & n.818) (noting record statements that declining to require unbundling would increase investment in next-generation fiber to the home by more than 600%). *Verizon* does not establish that the FCC may not reasonably limit unbundling where it finds that to be the case.

Indeed, even AT&T ultimately acknowledges that it is not arguing that "investment cannot be considered by the FCC in making unbundling determinations," AT&T Pet. 19, but rather is arguing only that such effects cannot be "presumed to result . . . or treated as established on the basis of vague 'suggestions' and speculation," *id.* In the end, therefore, AT&T's argument is limited to whether the FCC's case-specific conclusions about the effect of unbundling on investment in next-generation facilities were supported by substantial evidence. Not only is AT&T wrong for the specific reasons identified by the D.C. Circuit in rejecting these record-based claims, *see, e.g.*, App. 39a-42a, but also its argument presents a classic fact-bound issue that does not merit review by this Court. *See Universal Camera, supra.*

Finally, contrary to AT&T's lengthy argument, it is incorrect to say that the FCC's decision presents any issue of "'balanc[ing]' the benefits of greater competition against . . . diminished investment and innovation." AT&T Pet. 16. In concluding that CLECs are not impaired without these facilities (or could remedy any impairment through access to other facilities and limited unbundling), the FCC reasoned that CLECs could compete without the particular UNEs at issue and thus that there was *no* trade-off to be made. And the FCC highlighted the existence of intermodal alternatives that are not dependent on UNEs precisely because those alternatives ensure that consumers will get the benefits of competitive choice regardless of whether facilities are unbundled. *See, e.g.*, App. 332a (¶ 263). AT&T may disagree with the FCC's (and the D.C. Circuit's) analysis of the evidence — evidence showing that a *majority* of broadband consumers in fact rely upon intermodal choices such as cable modem, App. 331a (¶ 262 & n.777) — but that does not mean that the FCC was unconcerned about competition or that its evaluation of this evidence merits review by this Court.[20]

---

[20] California argues (at 14-16) that the Court should review the FCC's determinations regarding line sharing and hybrid loops because they are

III. PETITIONERS' ADDITIONAL ARGUMENTS ARE EQUALLY INSUBSTANTIAL

A. Both California (at 20-23) and NARUC (at 29-30) take issue with the FCC's conclusion that the federal agency, not the states, has jurisdiction to determine rates for facilities that Bell Operating Companies must make available under § 271, but that are not subject to unbundling under § 251(c)(3).

Although these parties rest their arguments on the state commissions' § 252 authority to arbitrate pricing disputes subject to federal-court review, *see, e.g.*, NARUC Pet. 29, the statute makes clear that state pricing authority under § 252 is limited to facilities that must be unbundled under § 251(c)(3). *See* 47 U.S.C. § 252(d)(1) (giving state commissions authority to determine rates for network elements "for purposes of [§ 251(c)(3)]"). It is equally clear that Congress gave the FCC, not state commissions, sole authority to implement and enforce § 271. *See id.* § 271(d)(3), (6)(A). For these reasons, petitioners' arguments about the allegedly broad scope of state authority under § 252 are irrelevant: the specific requirements of §§ 251 and 252 simply do not apply when a facility must be made available only as a result of § 271. *See* App. 54a (concluding that there is "no serious argument" that the "§ 251 pricing rules apply to unbundling pursuant to § 271"). In any event, neither this Court nor any other court of appeals has reached a different conclusion on this § 271 issue, and there is no other reason for the Court to review the

---

allegedly "arbitrary and capricious" and because the FCC supposedly overstated the significance of widespread cable deployment. There is no reason for the Court to wade into such record-based issues, but in any case California's arguments are unpersuasive and do not overcome the deference to which the FCC is entitled on such issues. For instance, California does not dispute that, as noted in the text, cable modem is by far the market-leading technology. And, even in California, the FCC's statistics demonstrate that there are two or more broadband providers in 92% of zip codes. *See* Indus. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003*, at Table 13 (June 2004).

FCC's sensible resolution of this specific question of statutory interpretation.

B. Contrary to California's argument, there is also no reason for the Court to review the FCC's decision to establish a methodology for setting rates during the transition period when ILECs must still make line sharing available. *See* Cal. Pet. 20-23. As the FCC explained, because line sharing is no longer required under § 251, the FCC employed its general rulemaking authority under § 201 of the Communications Act to establish requirements for this transitional period. *See* App. 338a (¶ 267). State authority to set rates under § 252 is thus again irrelevant. Additionally, even if § 252 applied, this Court has held that the FCC has authority to establish a pricing methodology governing state action under that provision, *see IUB*, 525 U.S. at 384-85, and that is all the FCC has done here. *See* App. 336a (¶ 265). Finally, and in any event, because this issue involves only a transitional mechanism that will expire in 2006 and that governs access to a single facility, it does not raise an issue meriting review.

C. California challenges the FCC's analysis of state authority to require unbundling of network elements under state law in circumstances where the FCC has found that federal law does not require such unbundling. *See* Cal. Pet. 23-28; App. 272a (¶ 195). But the D.C. Circuit concluded that this issue was not ripe because the FCC "has not taken any view on any attempted state unbundling order." App. 63a. The D.C. Circuit applied standard two-pronged ripeness analysis, *see* App. 63a-64a; *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 151 (1967), and California does not explain why the D.C. Circuit's application of those established principles to this case merits review. Nor does California claim that the court of appeals' ripeness decision conflicts with any ruling of this Court or of any other court of appeals. It has thus provided no reason to grant plenary review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

JAMES W. OLSON
INDRA SEHDEV CHALK
MICHAEL T. MCMENAMIN
ROBIN E. TUTTLE
UNITED STATES TELECOM ASSOCIATION
1401 H Street, N.W., Suite 600
Washington, D.C. 20005
(202) 326-7300
Counsel for United States Telecom Association

JAMES D. ELLIS
PAUL K. MANCINI
JOSEPH E. COSGROVE, JR.
SBC COMMUNICATIONS INC.
175 East Houston
San Antonio, Texas 78205
(210) 351-3500

GARY L. PHILLIPS
CHRISTOPHER HEIMANN
JAMES P. LAMOUREUX
SBC COMMUNICATIONS INC.
1401 I Street, N.W., Suite 400
Washington, D.C. 20005
(202) 326-8910
Counsel for SBC Communications Inc.

MICHAEL K. KELLOGG
Counsel of Record
MARK L. EVANS
SEAN A. LEV
COLIN S. STRETCH
SCOTT H. ANGSTREICH
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., United States Telecom Association, and the Verizon telephone companies

ANDREW CRAIN
ROBERT B. MCKENNA
CRAIG BROWN
QWEST COMMUNICATIONS INTERNATIONAL INC.
1801 California Street, 51st Floor
Denver, Colorado 80202
(303) 672-2861
Counsel for Qwest Communications International Inc.

JAMES G. HARRALSON
BENNETT L. ROSS
THEODORE R. KINGSLEY
E. EARL EDENFIELD JR.
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, Georgia 30309
(404) 249-2641
Counsel for BellSouth Corporation

WILLIAM P. BARR
MICHAEL E. GLOVER
JOHN P. FRANTZ
EDWARD SHAKIN
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, Virginia 22201
(703) 351-3099

HENRY WEISSMANN
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, California 90071
(213) 683-9100
Counsel for the Verizon telephone companies

September 1, 2004